88-40

No.

Supreme Court, U.S.
FILED
JUL 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK S. ZOLIN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES FRIED
Solicitor General
WILLIAM S. ROSE, JR.
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
ALAN I. HOROWITZ
Assistant to the Solicitor General
CHARLES E. BROOKHART
JOHN A. DUDECK, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether, in the course of an action brought by the Internal Revenue Service to enforce a summons, the court may place restrictions on the disclosure of the summoned information.

2. Whether a prima facie case for the invocation of the crime-fraud exception to the attorney-client privilege must be established by independent evidence, or, alternatively, whether the applicability of that exception can be resolved by an in camera inspection of the allegedly privileged material.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Mary Sue Hubbard and the Church of Scientology of California intervened in the district court and are respondents here.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	3
Reasons for granting the petition	9
Conclusion	24
Appendix A	1a
Appendix B	10a
Appendix C	11a
Appendix D	25a
Appendix E	27a
Appendix F	30a

TABLE OF AUTHORITIES

Cases:

Antitrust Grand Jury, In re, 805 F.2d 155 (6th Cir. 1986) 19-20, 22
Berkley & Co., In re, 629 F.2d 548 (8th Cir. 1980) 19
Black v. *United States*, 534 F.2d 524 (2d Cir. 1976) 18
Bob Jones Univ. v. *Simon*, 416 U.S. 725 (1974) 18
Bourjaily v. *United States*, No. 85-6725 (June 23, 1987) .. 21
Church of Scientology v. *IRS*, No. 86-472 (Nov. 10, 1987) 11
Clark v. *United States*, 289 U.S. 1 (1933) 5, 20
Donaldson v. *United States*, 400 U.S. 517 (1971) 9, 13, 14, 15
Dunn v. *Ross*, 356 F.2d 664 (5th Cir. 1966) 12
Fisher v. *United States*, 425 U.S. 391 (1975) 20
Grand Jury Investigation, In re, 842 F.2d 1223 (11th Cir. 1987) 5
Grand Jury Proceedings (FMC Corp.), In re, 604 F.2d 798 (3d Cir. 1979) 20
Halkin v. *Helms*, 598 F.2d 1 (D.C. Cir. 1978) 21
John Doe Corp., In re, 675 F.2d 482 (2d Cir. 1982) 20
Kerr v. *United States Dist. Court*, 426 U.S. 394 (1976) ... 21
Lowrie v. *United States*, 824 F.2d 827 (10th Cir. 1987) ... 18

Cases – Continued: Page

Sealed Case, In re, 676 F.2d 793 (D.C. Cir. 1982) 20
Sealed Case, In re, 754 F.2d 395 (D.C. Cir. 1985) 20
Special Sept. 1978 Grand Jury II, In re, 640 F.2d 49 (7th Cir. 1980) 20
Union Camp Corp. v. *Lewis*, 385 F.2d 143 (4th Cir. 1967) 20
United States v. *Arthur Young & Co.*, 465 U.S. 805 (1984) 15
United States v. *Author Services, Inc.*, 804 F.2d 1520 (9th Cir. 1986) 7, 10, 11, 13
United States v. *Balanced Fin. Mgmt., Inc.*, 769 F.2d 1440 (10th Cir. 1985) 16
United States v. *Barrett*, 804 F.2d 1376 (1986), rev'd, 837 F.2d 1341 (5th Cir. 1988), petition for cert. pending, No. 87-1705 ..... 10, 12, 13, 16-17
United States v. *Berney*, 713 F.2d 568 (10th Cir. 1983) ... 16
United States v. *Bisceglia*, 420 U.S. 141 (1975) 15
United States v. *Chemical Bank*, 593 F.2d 451 (2d Cir. 1979) 16
United States v. *Davis*, 636 F.2d 1028 (8th Cir.), cert. denied, 454 U.S. 862 (1981) 13
United States v. *Ernst & Whinney*, 750 F.2d 516 (6th Cir. 1984) 15
United States v. *First Family Mortgage Corp.*, 739 F.2d 1275 (7th Cir. 1984) 18
United States v. *Friedman*, 445 F.2d 1076 (9th Cir.), cert. denied, 404 U.S. 958 (1971) 7, 8
United States v. *King*, 536 F. Supp. 253 (C.D. Cal. 1982) 23
United States v. *Kis*, 658 F.2d 526 (7th Cir. 1981) 13
United States v. *LaSalle Nat'l Bank*, 437 U.S. 298 (1978) 14
United States v. *McAnlis*, 721 F.2d 334 (11th Cir. 1983), cert. denied, 467 U.S. 1227 (1984) 16
United States v. *Nixon*, 418 U.S. 683 (1974) 21
United States v. *Powell*, 379 U.S. 48 (1964) 9, 15
United States v. *Rylander*, 460 U.S. 752 (1983) 13
United States v. *Shewfelt*, 455 F.2d 836 (9th Cir.), cert. denied, 406 U.S. 944 (1972) 7, 8, 19
United States v. *Texas Heart Inst.*, 755 F.2d 469 (5th Cir. 1985) 7, 11, 12
Upjohn Co. v. *United States*, 449 U.S. 383 (1981) 20

Statutes and rules:: Page

Internal Revenue Code of 1954 (26 U.S.C.):
§ 6103 ..... 11, 12, 15, 16, 17, 18
§ 6103(a) 11
§ 6103(c)-(o) 12
§ 6103(k)(6) 12, 15
§ 6110 17
§ 6110(f)(3) 17
§ 7213(a) 17
§ 7402(a) 10
§ 7431 17
§ 7602 2
§ 7602(c) 14
§ 7604(a) 3
§ 7609(c) 14
Privacy Act, 5 U.S.C. 552a 16
Tax Anti-Injunction Act, 26 U.S.C. 7421(a) 3, 18
Fed. R. Evid.:
Rule 104(a) 22
Rule 501 22
Rule 801(d)(2)(E) 21

Miscellaneous:

H.R. Rep. 94-658, 94th Cong., 2d Sess. (1976) 14
Proposed Rules of Evidence for the United States District Courts and Magistrates (Preliminary Draft 1969), 46 F.R.D. 161:
Rule 5-03(d), 46 F.R.D. 251 22
Advisory Committee Note, 46 F.R.D. 256 22
Rule 5-03(d)(1), 46 F.R.D. 251 22
M. Saltzman, *IRS Practice and Procedure* (1981) 13, 14
S. Rep. 97-494, 97th Cong., 2d Sess. (1982) 14

In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK S. ZOLIN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the en banc court vacating the order granting rehearing (App., *infra*, 1a-9a) is reported at 842 F.2d 1135. The earlier order of the en banc court granting rehearing (App., *infra*, 10a) is reported at 832 F.2d 127. The opinion of the panel (App., *infra*, 11a-24a) is reported at 809 F.2d 1411. The March 12, 1985, interim order of the district court (App., *infra*, 30a-32a), the April 30, 1985, order of the district court (App., *infra*, 27a-29a), and the June 10, 1985, order of the district court denying reconsideration (App., *infra*, 25a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1987. A petition for rehearing was granted on

November 6, 1987 (App., *infra*, 10a), and that order was vacated as improvidently granted on March 28, 1988 (App., *infra*, 2a). On June 20, 1988, Justice O'Connor extended the time to petition for a writ of certiorari to and including July 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.) provides in pertinent part:

EXAMINATION OF BOOKS AND WITNESSES

(a) AUTHORITY TO SUMMON, ETC.—For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

* * * * *

Section 7604(a) of the Internal Revenue Code of 1954 (26 U.S.C.) provides in pertinent part:

ENFORCEMENT OF SUMMONS.

(a) JURISDICTION OF DISTRICT COURT—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

* * * * *

Section 7421(a) of the Internal Revenue Code of 1954 (26 U.S.C.) provides in pertinent part:

PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION

(a) TAX.—Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), and 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * * * *

STATEMENT

1. In July 1984, the Criminal Investigative Division of the Internal Revenue Service (IRS) began investigating the

tax returns of L. Ron Hubbard and others for tax years 1979-1983. Prior to the commencement of the investigation, Los Angeles newspapers had reported that former officials of the Church of Scientology had testified in *Church of Scientology* v. *Gerald Armstrong*, No. C 420 153 (Cal. Super. Ct.), that various Church of Scientology entities had transferred millions of dollars to Hubbard in the late 1970s and early 1980s. In October 1984, the IRS served an administrative summons on the Clerk of the California Superior Court, an office now occupied by respondent Zolin, seeking a number of documents contained in the record of the *Armstrong* case. The Clerk's office produced some of the documents, but it refused to produce 13 documents that had been ordered sealed by the Superior Court. The government then initiated this proceeding in the United States District Court for the Central District of California to enforce the summons. App., *infra*, 12a.

Respondents Mary Sue Hubbard and Church of Scientology intervened to oppose enforcement of the summons. They contended, inter alia, that the summons had been issued for the improper purpose of gathering information for use by other government agencies. After an evidentiary hearing, the district court rejected this contention. The court stated that the "Church has failed to raise any doubt of the good faith of the Internal Revenue Service in pursuing this summons enforcement proceeding" (App., *infra*, 27a). The court explained that the summons was validly issued pursuant to a bona fide criminal tax investigation of L. Ron Hubbard and that "the agent issuing the summons was in good faith in doing so, and did not do so for an improper purpose, or to harass the taxpayer, or for a collateral purpose" (*ibid.*). The court therefore enforced the summons in part, ordering production of the five disputed

documents that it found to be relevant and not privileged (*id.* at 28a).

The court's order further provided that the documents produced "shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained" (App., *infra*, 29a). In denying the government's subsequent motion for reconsideration, the court explained this restriction as follows (*id.* at 26a): "Since the entire basis of the summons proceeding was to obtain material for a tax investigation, the court thinks it reasonable to restrict the use of the material for that purpose, unless a criminal prosecution is instituted. If exigencies of other litigation make it necessary, the IRS is free to make its case for an exception to this court."

The court also denied enforcement of the summons in part, ruling that eight of the documents were either irrelevant or privileged. In particular, the court ruled that Exhibit 5C, tape recordings of two meetings between various attorneys and representatives of L. Ron Hubbard and the Church of Scientology that are known as the "MCCS tapes," was protected by the attorney-client privilege. The government argued that the "crime-fraud" exception to the attorney-client privilege was applicable,[1] relying on affidavits from a special agent that contained partial transcripts of the tapes and that stated that the excerpts and his discussions with former Church employees had

---

[1] It is well established that the attorney-client privilege does not protect communications made in furtherance of a crime or fraud. To invoke this exception, there must be a prima facie showing that the client was engaged in or planning criminal or fraudulent conduct and that the attorney's advice was in furtherance of or closely related to the criminal or fraudulent activity. See, *e.g.*, *Clark* v. *United States*, 289 U.S. 1, 15-16 (1933); *In re Grand Jury Investigation*, 842 F.2d 1223, 1226-1227 (11th Cir. 1987).

given the agent reason to believe that the meetings were part of a criminal conspiracy to defraud the United States (see App., *infra*, 23a-24a, 28a).[2] The court found that the government had not demonstrated the applicability of the crime-fraud exception, stating that "[t]he quoted excerpts tend to show or admit past fraud but there is no clear indication that future fraud or crime is being planned" (*id.* at 28a). The government sought reconsideration on the ground that the court should not have rejected the applicability of the exception without an in camera inspection of the complete tapes. The court denied the motion (App., *infra*, 25a-26a).[3]

2. A panel of the court of appeals affirmed (App., *infra*, 11a-24a). The court rejected the government's conten-

[2] The affidavits alleged that the taped meetings, part of the MCCS (Mission Corporate Category Sortout) Project, "focused generally on the intentional violation of the tax laws," specifically, "(i) a proposed scheme whereby the Church's cash transfers to Hubbard would be disguised as payments for services rendered (allegedly to insulate Hubbard from tax liability and to protect the Church's tax-exempt status), and (ii) a proposed scheme whereby Hubbard would be able to control royalty income * * * without that control being traceable to him" (App., *infra*, 23a-24a).

[3] The court stated that, "[w]hile * * * at one time [listening to the tapes in toto was] discussed with counsel, thereafter Mr. Petersell's declaration was submitted, and no one suggested that this was an inadequate basis on which to determine the attorney-client privilege question" (App., *infra*, 25a-26a). In fact the pleadings filed with the court together with the Petersell declarations on March 8 and 15, 1985, specifically requested the court to listen to the tapes themselves if the court concluded that the partial transcripts and the special agent's declarations did not sufficiently demonstrate the applicability of the crime-fraud exception. See Mar. 8, 1985 Government's Response to Intervenor's Opposition at 6; Mar. 15, 1985, Petitioner's Memorandum in Response to Court's Request and for Partial Reconsideration of Interim Ruling at 11. The court of appeals did not address the question of the sufficiency of the in camera showing because it concluded that the contents of the tapes themselves could not be used to demonstrate the applicability of the crime-fraud exception (see pages 7-8, *infra*).

tion that the district court had exceeded its authority in a summons enforcement proceeding by imposing limitations on the IRS regarding disclosure of the summoned information (*id.* at 18a-19a). Relying on its prior decision in *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1525 (9th Cir. 1986), which in turn had relied upon *United States* v. *Texas Heart Inst.*, 755 F.2d 469, 481 (5th Cir. 1985), the court concluded that "[a] district court may, when appropriate, condition enforcement of a summons on the IRS's agreeing to abide by disclosure restrictions" (App., *infra*, 19a).

The panel also affirmed the trial court's ruling that the crime-fraud exception was not applicable to the MCCS tapes (App., *infra*, 21a-24a). Citing *United States* v. *Shewfelt*, 455 F.2d 836 (9th Cir.), cert. denied, 406 U.S. 944 (1972), the panel explained that circuit precedent had established the rule that the crime-fraud exception could be invoked to justify disclosure of otherwise privileged communications only where the government establishes " 'a prima facie case of fraud *independently* of said communications' " (App., *infra*, 21a, quoting 455 F.2d at 840 (emphasis in original)). While noting that "*Shewfelt*'s independent evidence requirement ha[d] been strongly criticized" and rejected by other courts, and that another Ninth Circuit decision, *United States* v. *Friedman*, 445 F.2d 1076, cert. denied, 404 U.S. 958 (1971), had "implicitly recognized that a district court may examine the disputed communications themselves in order to determine the applicability of the 'crime-fraud' exception," the panel concluded that it was bound to follow the independent evidence rule of *Shewfelt* unless that case was overruled en banc (App., *infra*, 22a-23a). Applying that rule, the panel concluded that the independent evidence in this case, consisting of the special agent's declarations describing his conversations with certain former Church employees (but

not the partial transcripts of the tapes), "while not altogether insubstantial, [was] not sufficient to make out the requisite prima facie showing of intended illegality" (*id.* at 23a-24a).

3. The court of appeals ordered the case reheard en banc (App., *infra*, 10a). Following supplemental briefing and oral argument, however, the en banc court entered an order vacating "as improvidently granted" the previous order granting rehearing en banc (*id.* at 1a-2a). The order explained that there was no conflict between *United States* v. *Shewfelt, supra*, and *United States* v. *Friedman, supra,* because *Friedman* did not discuss whether there was an independent evidence requirement. The en banc court confirmed that *Shewfelt* was the law of the circuit on this point, holding that "the government must make a prima facie showing, independent of the communications involved, that the attorney-client communications were in furtherance of an intended or present illegality" (App., *infra*, 2a). The en banc court also ordered withdrawn the six paragraphs in the panel opinion that had noted and discussed the criticisms of *Shewfelt* (see App., *infra*, 21a-23a). *Id.* at 2a.

Three judges dissented from the en banc court's order, arguing that rehearing en banc had not been improvidently granted and that the en banc court should overrule *Shewfelt* (App., *infra*, 2a-9a). The dissenters criticized the majority for "perpetuat[ing] a maverick version of the attorney-client privilege" that "clashes with that of a majority of other circuits," noting that "the attorney-client privilege, as a rule of evidence for the federal courts, has an overriding need for national uniformity" (*id.* at 3a). The dissenters noted that "[e]very circuit to face the situation this case presents has allowed in camera inspection," citing cases from six different courts of appeals (*id.* at 4a).

The dissenters then discussed the merits of the independent evidence rule (*id.* at 4a-8a) and concluded that they "would overrule *Shewfelt*, eliminate the independent evidence requirement, and allow in camera inspection of suspect communications" (*id.* at 8a).

REASONS FOR GRANTING THE PETITION

This case presents two distinct questions that are of considerable importance to the exercise of the IRS's summons authority and on each of which there exists a direct conflict in the circuits. First, the court of appeals' holding that it is appropriate in a summons enforcement proceeding for a district court to impose limitations on the dissemination by the IRS of the summoned information poses a serious threat to the expeditious enforcement of summonses. This Court has recognized that summons enforcement proceedings should be summary in nature and limited to the determination of the IRS's right to obtain needed information. See *Donaldson* v. *United States*, 400 U.S. 517, 529 (1971); *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). The expansion of the scope of summons enforcement proceedings sanctioned by the court of appeals here substantially departs from that model by prolonging the proceedings and by interjecting into them extraneous and difficult issues concerning the allowable scope of IRS disclosures of tax return information.

Second, the court of appeals' "maverick" (App., *infra*, 3a) approach to the crime-fraud exception poses a serious practical obstacle to the invocation of that exception because independent evidence that an attorney-client communication involves a crime or a fraud often will not be available. The result is that communications that, upon examination, would reveal themselves to be clearly outside the scope of the attorney-client privilege nevertheless will be withheld from government investigators.

Thus, two separate aspects of the decision below threaten to create severe obstacles for the IRS in conducting its tax investigations. Because each of these important holdings directly conflicts with decisions of other courts of appeals, this Court should grant certiorari to resolve the conflicts.

1. a. The decision below, and the Ninth Circuit's prior decision in *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1525-1526 (1986), on which the court below relied, directly conflict with the rule adopted by the Fifth Circuit en banc in *United States* v. *Barrett*, 837 F.2d 1341 (1988), petition for cert. pending, No. 87-1705. *Author Services* involved another IRS summons issued in the course of the same tax investigation involved in the present case. The court enforced the summons, but it also upheld the portion of the district court's order that prohibited the IRS from delivering the summoned documents to any agency or individual without a court order, unless a criminal tax prosecution was being sought. The court of appeals found that this condition was justified because the many levels of ongoing litigation between the Church of Scientology and the government had given the district court the "fear 'that information acquired for one purpose may be in effect used for civil discovery in the other' " (804 F.2d at 1526). The court of appeals concluded that the imposition of conditions upon disclosure of summoned information is justified by the court's "broad authority, under 26 U.S.C. § 7402(a) (1982), to issue any orders or decrees 'as may be necessary or appropriate for the enforcement of the internal revenue laws' " (804 F.2d at 1525); on the facts there, the court concluded that the condition imposed by the district court was "a wise exercise of control, serving the interests of judicial economy" (*id.* at 1526). Here, the court of appeals simply followed *Author Services* in upholding the same condition upon the

disclosure of information obtained pursuant to another summons issued in the course of the same investigation of the Church of Scientology (App., *infra*, 19a).

The Ninth Circuit's decisions allowing the conditional enforcement of summonses cannot be reconciled with the rule established in the Fifth Circuit. The latter court originally reached the same conclusion as the Ninth Circuit on this issue in *United States* v. *Texas Heart Inst.*, 755 F.2d 469 (5th Cir. 1985), and, indeed, that decision was cited by the Ninth Circuit both in *Author Services* (804 F.2d at 1525) and in the present case (App., *infra*, 19a). In *Texas Heart*, pursuant to a criminal tax investigation of Dr. Bernard Barrett, the IRS had issued summonses to several hospitals seeking lists of Dr. Barrett's patients. All but four of the hospitals complied with the summonses. The IRS then sent form letters to each of the patients stating that Dr. Barrett was under investigation by the IRS and requesting information about the fees paid to him. In an action brought by the IRS to enforce the summonses issued to the four hospitals that had not complied, the district court refused to enforce the summonses, objecting in part to the form letters that were being sent to the patients whose identities were divulged by the hospitals. The court of appeals reversed and ordered the summonses enforced, holding, inter alia, that Barrett's assertion that the IRS had violated 26 U.S.C. 6103 in disclosing to his patients that he was under investigation provided no basis for doubting the IRS's good faith in issuing the summonses and therefore no basis for not enforcing them.[4]

---

[4] Section 6103(a) generally prohibits the IRS from disclosing tax "return information" except in the circumstances specifically permitted by that section. See generally *Church of Scientology* v. *IRS*, No. 86-472 (Nov. 10, 1987), slip op. 1-3. Section 6103 then sets forth in considerable detail the circumstances under which such disclosures are authorized to certain identified parties, including specified govern-

The court added, however, that if the district court determined that improper disclosures had been made to the patients, the "enforcement of the summonses may be conditioned on an IRS agreement to cease such improper disclosures" (755 F.2d at 481).

The Fifth Circuit, however, has specifically overruled *Texas Heart*, and its rule is now in direct conflict with that of the Ninth Circuit. *United States* v. *Barrett*, 804 F.2d 1376 (1986), rev'd en banc, 837 F.2d 1341 (1988), petition for cert. pending, No. 87-1705, involved another summons in the same investigation, which was addressed to Barrett's professional corporation. The panel, concluding that it was bound by *Texas Heart*, ordered the district court to consider whether the summons should be conditionally enforced. The full court granted the government's petition for rehearing en banc, however, and affirmed the district court's decision to enforce the summons unconditionally. The en banc court held that a district court lacks the power to impose conditions upon the enforcement of a summons, and it explicitly overruled both *Texas Heart* (837 F.2d at 1351) and an earlier decision, *Dunn* v. *Ross*, 356 F.2d 664 (5th Cir. 1966), to the extent that it could be read "to endorse the district court's ability to conditionally enforce a summons" (837 F.2d at 1350).

---

ment agencies, congressional committees, and representatives of a taxpayer. See 26 U.S.C. 6103(c)-(o). The information that Barrett was under investigation falls within the definition of "return information" that is protected by Section 6103. The government's position was that the disclosure in the letters was authorized by 26 U.S.C. 6103(k)(6), which permits the disclosure of return information "to the extent * * * necessary in obtaining information" in connection with an audit or other investigation related to the enforcement of the revenue laws.

The conflict between the Fifth and Ninth Circuits on this issue could not be clearer.[5] In *Author Services*, the Ninth Circuit rejected the government's contention that "the court is limited to either enforcing a summons or denying enforcement," stating that "[c]learly this is not the case" (804 F.2d at 1525). By contrast, the en banc court in *Barrett* explicitly held that, "[i]n a summons enforcement proceeding, the district court's only task is to determine whether the summons should or should not be enforced" (837 F.2d at 1350). And the court of appeals here expressly held that, in the Ninth Circuit, "[a] district court may, when appropriate, condition enforcement of a summons on the IRS' agreeing to abide by disclosure restrictions" (App., *infra*, 19a). The *Barrett* court held, to the direct contrary, that "[t]he district court does not have the power to conditionally enforce the summons" (837 F.2d at 1350).

b. Because the question of the power of a district court to place conditions on the enforcement of a summons has a substantial effect on the IRS's ability to conduct its investigations, it is important that the conflict in the circuits on this point be resolved. It is well established that summons enforcement proceedings are designed to be "summary" in nature. *Donaldson* v. *United States*, 400 U.S. at 529; see also, *e.g.*, *United States* v. *Rylander*, 460 U.S. 752, 756 (1983); *United States* v. *Kis*, 658 F.2d 526, 535-536 (7th Cir. 1981); *United States* v. *Davis*, 636 F.2d 1028, 1038 (8th Cir.), cert. denied, 454 U.S. 862 (1981); M. Saltzman, *IRS Practice and Procedure* ¶ 13.04, at 13-25 to 13-27 (1981). An expeditious mechanism for enforcement is essential because delay can seriously interfere with

---

[5] Indeed, the en banc Fifth Circuit in *Barrett* expressly acknowledged (837 F.2d at 1351 n.11) the contrary Ninth Circuit decisions in *Author Services* and in the present case.

the IRS's exercise of its investigative authority. Thus, this Court has limited the right of taxpayers to intervene in summons enforcement proceedings (*Donaldson* v. *United States, supra*), "apparently out of concern for the ability of a taxpayer to delay the investigative process by forcing protracted enforcement proceedings" (M. Saltzman, *supra,* at 13-25). And the Court has rejected the introduction into summons enforcement proceedings of issues going beyond the traditional inquiry into "institutional good faith," noting that the additional inquiries would cause "undesirable" delays. *United States* v. *LaSalle Nat'l Bank,* 437 U.S. 298, 316 (1978). Congressional enactments stimulated by those decisions have been responsive to the same concerns. See 26 U.S.C. 7602(c), 7609(c); S. Rep. 97-494, 97th Cong., 2d Sess. 285 (1982); H.R. Rep. 94-658, 94th Cong., 2d Sess. 309 (1976).

The decision of the court of appeals ignores this clearly established statutory policy to avoid delay, and it therefore poses a serious threat to the IRS's ability to conduct efficient tax investigations. As the court of appeals frankly acknowledged (App., *infra,* 19a), "[t]he district court's order in this case created a mechanism whereby the district court could monitor the IRS' use of the summoned documents." Thus, far from the "summary" enforcement proceeding, the court of appeals has sanctioned a procedure under which the IRS's investigation will be subject to constant scrutiny and attack by the summoned party. In the context of a criminal investigation, litigation over IRS summonses typically is a struggle between the government's efforts to obtain information in a timely fashion and the taxpayer's attempts to delay the investigation. Allowing taxpayers to litigate hypothetical or anticipatory disclosure questions in summons enforcement proceedings would lead to the courts' repeated involvement at each new step of the investigation, which has the

potential to cause significant delays while the courts supervise the government's use of the summoned material.[6] Thus, if permitted to stand, the court of appeals' decision would have deleterious effects on the enforcement of the tax laws because it would " 'stultify' and unduly delay the investigation sought by the IRS" into violations of those laws. *United States* v. *Ernst & Whinney,* 750 F.2d 516, 520 (6th Cir. 1984) (quoting *Donaldson* v. *United States,* 400 U.S. at 531).

c. The decision below is erroneous. This Court has repeatedly emphasized that the role of the judiciary in a summons enforcement action is a limited one—to guard against abuses of the power to summon documents or testimony. See, *e.g., United States* v. *Bisceglia,* 420 U.S. 141, 150 (1975); *United States* v. *Powell,* 379 U.S. at 57-58. That role plainly does not encompass supervising the investigation and the manner in which the IRS uses the summoned material. The summons power, of course, is not absolute; as this Court made clear in *Powell,* the court may refuse to enforce the summons if it finds that it was not issued in good faith—*i.e.,* if the summons is not relevant to an investigation conducted pursuant to a legitimate purpose. *Id.* at 58. If a summons meets that good faith threshold, however, the Court has consistently held that restrictions on the IRS's summons authority should not be imposed " 'absent unambiguous directions from Congress.' " *United States* v. *Arthur Young & Co.,* 465 U.S. 805, 816 (1984) (quoting *United States* v. *Bisceglia,* 420 U.S. at 150).

---

[6] The actual litigation that would ensue in the course of this "monitoring" of the investigation would likely be protracted because it would often center upon complex and difficult questions of interpreting 26 U.S.C. 6103, particularly the scope of the subsection authorizing disclosure when necessary for law enforcement purposes (Section 6103(k)(6)).

Here, both courts below agreed that the summons met the *Powell* standards and should be enforced. And the courts did not suggest that any future disclosures by the IRS would create any question about the good faith of the investigation; despite the Church's allegations that other government agencies were concerned with its operations, the district court found that the Church had "failed to raise any doubt of the good faith of the Internal Revenue Service in pursuing this summons enforcement proceeding" (App., *infra*, 27a). This conclusion was clearly correct because the question of good faith in issuing a summons (*i.e.*, whether it is issued in aid of an investigation conducted pursuant to a legitimate purpose) is wholly independent of the question whether the IRS has made disclosures that violate Section 6103. As one court of appeals has stated in rejecting a similar objection to enforcement of a summons on the ground that there had been Section 6103 violations, evidence of unlawful disclosures "does not reflect on the good faith of the investigation itself" (*United States* v. *Balanced Fin. Mgmt., Inc.*, 769 F.2d 1440, 1448 (10th Cir. 1985)). See also *United States v. Chemical Bank*, 593 F.2d 451, 456 (2d Cir. 1979).[7]

The Fifth Circuit correctly stated in *Barrett* that the court's role in a summons enforcement proceeding is limited to determining whether the summons was issued in good faith and "[t]here is no statutory authority, nor congressional indication that existing statutes supply the authority, nor Supreme Court authority, to allow the district court to make any consideration except whether to

[7] By the same token, the courts of appeals have held that the question whether the IRS has complied with the provisions of the Privacy Act, 5 U.S.C. 552a, is irrelevant to whether a summons should be enforced. *United States* v. *McAnlis*, 721 F.2d 334, 337 (11th Cir. 1983), cert. denied, 467 U.S. 1227 (1984); *United States* v. *Berney*, 713 F.2d 568, 572-573 (10th Cir. 1983).

enforce or not to enforce the summons" (837 F.2d at 1350). The apparent purpose of the conditions on disclosure imposed by the district court here was to ensure that the IRS would not violate the confidentiality protections of Section 6103 in its future use of the summoned material; in the words of the court of appeals, the enforcement order established "a mechanism whereby the district court could monitor the IRS's use of the summoned documents" (App., *infra*, 19a). But Congress established a remedial framework for enforcing Section 6103, and there is no reason to conclude that those remedies are inadequate when the documents in question have been obtained by means of a summons. Therefore, the court below erred in interfering with the established, summary nature of summons enforcement proceedings in an effort to augment judicially the statutory framework for enforcing Section 6103.

Congress created both a civil damage remedy for violations of Section 6103 (see 26 U.S.C. 7431) and criminal sanctions against federal employees who make unlawful disclosures (see 26 U.S.C. 7213(a)). But Congress did not provide a means for an individual to seek injunctive relief against possible future violations of Section 6103.[8] Thus, if a person believes that the IRS is planning to make an unlawful disclosure of confidential tax return information that he supplied to the agency, he cannot bring suit to

[8] 26 U.S.C. 6110 authorizes disclosure and public inspection of certain "written determination[s]," including private letter rulings. That provision requires the IRS to give pre-disclosure notice to persons to whom the determination pertains, and it gives those persons, if they object to the IRS's failure to make a deletion in order to preserve their confidentiality, the right to seek a pre-disclosure determination in the Tax Court of their right to such a deletion (Section 6110(f)(3)). There is no analogous right to go to court to challenge a proposed disclosure under Section 6103.

enjoin or prevent that disclosure; rather, he is limited to the remedy provided by Congress of seeking damages, if, in fact, such a disclosure actually occurs. There is no reason why a different rule should obtain where the confidential information was obtained by means of a summons. If the summons meets the traditional criteria for enforcement, then the district court is obliged to enforce it and order the material turned over to the IRS. The investigation should not be delayed while the court embarks on a course of litigation (and presumably appellate litigation) about whether certain conditions should or should not be included in the particular enforcement order. Nor is the court empowered to monitor the IRS's investigation to prevent the disclosure of that material in violation of Section 6103; rather, if such a disclosure occurs, the aggrieved person may invoke the remedies provided by Congress.

Indeed, the condition imposed by the courts in this case on enforcement of the summons violates the specific restrictions of the Tax Anti-Injunction Act, 26 U.S.C. 7421(a). That statute generally withdraws jurisdiction from the courts to hear suits for the "purpose of restraining the assessment or collection of any tax," and it has been broadly construed to apply to any IRS activity necessary to determine tax liability, including investigative activity. Thus, the courts have held that the Act applies to bar "a taxpayer seeking to enjoin the IRS from acquiring or using the information necessary" to determine tax liability. *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275, 1278 (7th Cir. 1984). See, *e.g.*, *Lowrie* v. *United States*, 824 F.2d 827, 830-831 (10th Cir. 1987); *Black* v. *United States*, 534 F.2d 524, 526-527 (2d Cir. 1976); see also *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 738-739 (1974). This case falls within the proscription of the Anti-Injunction Act. The district court has restrained the IRS's conduct of its investigation by enjoining it

(pending a further court order) from making full use of material that is lawfully in it its possession pursuant to a valid summons.

2. a. The court of appeals' restrictive view of the crime-fraud exception to the attorney-client privilege directly conflicts with the prevailing rule in the other courts of appeals. The en banc court in this case stated unequivocally that *United States* v. *Shewfelt*, 455 F.2d 836 (9th Cir.), cert. denied, 406 U.S. 944 (1972), remains the law of the Ninth Circuit. In *Shewfelt*, the court had stated that "before the privileged status of [attorney-client] communications can be lifted, the government must first establish a prima facie case of fraud *independently* of the said communications" (455 F.2d at 840 (emphasis added)), and the court restated that rule in essentially the same terms in this case (App., *infra*, 2a). As the dissenters from the en banc ruling stated, this independent evidence requirement has never been adopted by another court of appeals and constitutes "a maverick version of the attorney-client privilege" that "clashes with that of a majority of other circuits" (*id.* at 3a).

The Eighth Circuit explicitly rejected the *Shewfelt* rule in *In re Berkley & Co.*, 629 F.2d 548 (1980). The company from which documents had been subpoenaed by a grand jury in that case had relied on *Shewfelt* in arguing that independent evidence of crime or fraud was necessary to defeat its claim of attorney-client privilege. The Eighth Circuit flatly rejected that claim, noting that "[t]he cases relied on in *Shewfelt* * * * do not support the independent evidence restriction" (629 F.2d at 553 n.9). Moreover, as the dissenters in this case stated (App., *infra*, 4a), several other courts of appeals have approved in camera inspection of the documents in question in order to determine the applicability of the crime-fraud exception. See, *e.g.*, *In re Antitrust Grand Jury*, 805 F.2d 155, 168-169 (6th Cir.

1986); *In re Sealed Case*, 754 F.2d 395, 400 (D.C. Cir. 1985); *In re John Doe Corp.*, 675 F.2d 482, 490 (2d Cir. 1982); *In re Special Sept. 1978 Grand Jury II*, 640 F.2d 49, 59-61 (7th Cir. 1980); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 800 (3d Cir. 1979); *Union Camp Corp.* v. *Lewis*, 385 F.2d 143, 144 (4th Cir. 1967); see also *In re Sealed Case*, 676 F.2d 793, 815 (D.C. Cir. 1982) (footnote omitted) (opinion of Wright, J.) ("the subpoenaed material itself may provide *prima facie* evidence of a [crime or fraud]"). The rule reaffirmed by the Ninth Circuit in this case necessarily rejects the use of in camera inspection and cannot be squared with these decisions.

b. The Ninth Circuit clearly erred in adopting a rule that prevents the invocation of the crime-fraud exception unless the government can produce independent evidence that the communication in question relates to a crime or a fraud. Analysis of the issue points inexorably to the conclusion that the applicability of the crime-fraud exception may be demonstrated by an in camera inspection of the communication in question. The purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice" (*Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981)). The privilege applies where it is necessary to achieve its purpose, but it does not absolutely apply to all communications between attorney and client. See *Fisher* v. *United States*, 425 U.S. 391, 403 (1975). In particular, it does not apply when a client consults an attorney for advice in carrying on a contemplated or ongoing crime or fraud. See *Clark* v. *United States*, 289 U.S. 1, 15-16 (1933). In such a case, the communication is not designed to promote "the observance of law and administration of justice" (*Upjohn Co.* v. *United States*, 449 U.S. at 389), but to subvert it; extending a privilege to this

type of communication would not advance any desirable policy and would deny to the courts what may be highly probative evidence.

Thus, when an attorney-client communication is related to criminal or fraudulent activity, it is not privileged and should not be treated as if it were. This is equally true whether the relation to crime or fraud can be demonstrated only by examination of the communciation itself or whether it can also be shown by evidence independent of such examination. There is no rationale for a rule that would apply the crime-fraud exception to the privilege only in the latter case, but not in the former, and the Ninth Circuit makes no attempt either in this case or in *Shewfelt* to justify such a rule. The validity of many kinds of claims of privilege is commonly resolved by means of an in camera examination, and there is no reason why utilization of that procedure is any less appropriate when the issue is the applicability of the crime-fraud exception. See, *e.g.*, *Kerr* v. *United States Dist. Court*, 426 U.S. 394, 405-406 (1976); *United States* v. *Nixon*, 418 U.S. 683, 713-714 (1974); *Halkin* v. *Helms*, 598 F.2d 1, 5-6 (D.C. Cir. 1978).

This Court's recent decision in *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), further undermines any argument for the independent evidence requirement. There, the Court concluded that a previously-recognized independent evidence requirement for invocation of the co-conspirator hearsay exception (Fed. R. Evid. 801(d)(2)(E)) is no longer good law in modern practice under the Federal Rules of Evidence. The Court explained that there is no reason to exclude any probative evidence from the determination whether the exception should apply and that this approach is embodied in the language of

the new Rules (see Rule 104(a)).[9] The present case is an even stronger one for rejection of an independent evidence requirement than was *Bourjaily*. The independent evidence rule there was supported to some extent by the fact that the evidence whose admissibility was in doubt was hearsay and thus presumptively unreliable; it was arguable, therefore, that hearsay should not be viewed as probative evidence on the question whether the exception should apply. Here, by contrast, there is no doubt as to the reliability of the evidence; in camera examination of the disputed communication is often the *most reliable* way of determining whether it is related to a crime or a fraud. See, *e.g.*, *In re Antitrust Grand Jury*, 805 F.2d at 168. Moreover, the independent evidence rule at issue in *Bourjaily* had been fairly well established prior to the promulgation of the Rules of Evidence; here, by contrast, the Ninth Circuit's rule that independent evidence is required for in-

[9] The Federal Rules of Evidence do not govern the outcome here because Congress decided to leave to the common law evidentiary rules related to privileges, rather than to address them directly in the Rules. See Fed. R. Evid. 501. It is noteworthy, however, that the proposed rules that had been drafted to address questions of privilege clearly demonstrate that the Ninth Circuit's independent evidence rule is not supported by prior law. Proposed Rule of Evidence 5-03(d) set forth several exceptions to the attorney-client privilege, including the crime-fraud exception (Proposed Rule of Evidence 5-03(d)(1)), which were described by the drafters of the rules as "incorporat[ing] well established exceptions." 46 F.R.D. 251, 256 (1969). The Advisory Committee's Note on the crime-fraud exception specifically stated that "[n]o preliminary finding that sufficient evidence aside from the communication has been introduced to warrant a finding that the services were sought to enable the commission of a wrong is required" (*id.* at 256). Thus, the Ninth Circuit's independent evidence rule is at odds with the established common law practice in administering the crime-fraud exception.

vocation of the crime-fraud exception is at odds with prior law and the rule in other circuits.

If permitted to stand, the decision below would significantly impair IRS investigations (and other law enforcement investigations) in the Ninth Circuit. The actual contents of an attorney-client communication will often be the best evidence of whether the crime-fraud exception is applicable. Thus, permitting in camera inspection of such communications is the-most precise and efficient way of determining whether the claim of attorney-client privilege should be upheld. Moreover, in many cases, the contents of the communication will be the only evidence of whether it is related to crime or fraud. Accordingly, as one district court in the Ninth Circuit stated in declining to follow *Shewfelt*, the independent evidence rule, "in most instances, simply serve[s] to insulate dishonest attorneys from prosecution for obstruction of justice." *United States* v. *King*, 536 F. Supp. 253, 262 (C.D. Cal. 1982). See also App., *infra*, 5a. Probative evidence of crimes would be denied to investigators for no reason, since it is undisputed that protection of an attorney-client communication that is related to crime or fraud does not advance the purposes of the privilege. In light of the harmful consequences of the Ninth Circuit's independent evidence requirement, the fact that most courts of appeals have concluded that such a requirement is unnecessary and inappropriate, and the desirability of a uniform rule on this important evidentiary question of nationwide application, this Court should resolve the conflict in the circuits and harmonize the Ninth Circuit's approach to the crime-fraud exception with the rule prevailing in other courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM S. ROSE, JR.
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
ALAN I. HOROWITZ
Assistant to the Solicitor General
CHARLES E. BROOKHART
JOHN A. DUDECK, JR.
Attorneys

JULY 1988

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-6065
85-6105
D.C. No. CV85-440-HLH

UNITED STATES OF AMERICA,
PETITIONER/APPELLEE/CROSS-APPELLANT

v.

FRANK S. ZOLIN, RESPONDENT/APPELLEE

AND

CHURCH OF SCIENTOLOGY OF CALIFORNIA AND MARY SUE HUBBARD, INTERVENORS/APPELLANTS/CROSS-APPELLEES

ORDER AND DISSENT

Order Filed March 28, 1988

Before: BROWNING, Chief Judge, ANDERSON, TANG, PREGERSON, ALARCON, NORRIS, REINHARDT, BEEZER, BRUNETTI, THOMPSON AND LEAVY, Circuit Judges.

Dissent by Judge BEEZER

ORDER

En banc review was ordered in this matter under the mistaken assumption that *United States v. Shewfelt,* 455 F.2d 836 (9th Cir. 1972) and *United States v. Friedman,* 445 F.2d 1076 (9th Cir. 1971) were in conflict on the question whether "the government must first establish a prima facie case of fraud independently of the said

[attorney-client] communications," *Shewfelt,* 455 F.2d at 840, before "the privileged status of these communications can be lifted." *Id.* There is no conflict. In *United States v. Friedman*, we did not discuss the showing that the government must make *before* the trial court can examine attorney-client communications to determine whether "the thrust of these . . . conversations was to effectuate a plan of fraud." *Shewfelt,* 455 F.2d at 840. In *Shewfelt* we did, and concluded that the government must make a prima facie showing, independent of the communications involved, that the attorney-client communications were in furtherance of an intended or present illegality. *Id. Shewfelt* is the law of the circuit.

The dictum in *United States v. King,* 536 F. Supp. 253 (C.D. Cal. 1982) suggesting that *Shewfelt* "does not now appear to be the law in the Ninth Circuit," *id.* at 262, is disapproved. That portion of the three-judge panel opinion in *United States v. Zolin*, 809 F.2d 1411 (9th Cir. 1987), beginning with the first full paragraph on page 1418 to and including the last full paragraph in the second column on the same page, is ordered withdrawn. The opinion of the three-judge panel will stand in all other respects.

The order dated November 6, 1987, that this matter be reheard en banc, is vacated as improvidently granted.

BEEZER, Circuit Judge, with whom ANDERSON and THOMPSON, Circuit Judges, join, dissenting:

The order that this matter be reheard en banc was not improvidently granted. I dissent.

According to Ninth Circuit Rule 35-1, our order to rehear the matter en banc was entirely appropriate.[1] The independent evidence requirement is a procedure for in-

[1] Ninth Circuit Rule 35-1 states, "When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for suggesting a rehearing en banc."

voking the crime-fraud exception to the attorney-client privilege. We adopted this procedure, in a conclusory way, in *United States v. Shewfelt,* 455 F.2d 1076, 1080 (9th Cir. 1972). This procedure has not been endorsed by any other circuit court of appeals. The order filed today thus perpetuates a maverick version of the attorney-client privilege—a rule of national application. In addition, the attorney-client privilege, as a rule of evidence for the federal courts, has an overriding need for national uniformity. Considering that this circuit's position clashes with that of a majority of other circuits, our order that we rehear this matter en banc was most providently granted.

I

The crime-fraud exception defeats the attorney-client privilege. To invoke the exception, the government must make a prima facie showing that an otherwise privileged communication is in furtherance of fraud or crime. In this circuit the government has had to make the prima facie showing by the use of independent evidence—evidence other than the suspect communication itself. Elsewhere the government has been able to make the prima facie showing by the court's in camera inspection of the suspect communication. The substantive issue in this en banc case is: should we overrule *Shewfelt,* eliminate the independent evidence requirement, and allow in camera inspection of suspect communications? We should.

II

Every circuit to face the situation this case presents has allowed in camera inspection. In reverse chronological order, they are the Sixth, Second, D.C., Eighth, Third, and Fourth Circuits.[2] Following is a sample of the cases.

Sixth: *In Re Antitrust Grand Jury,* 805 F.2d 155, 168-169 (6th Cir. 1986).

Second: *In Re Grand Jury Subpoena Duces Tecum,* 798 F.2d 32 (2d Cir. 1986); *In Re John Doe Corp.,* 675 F.2d 482, 486 and 490 (2d Cir. 1982).

D.C.: *In Re Sealed Case,* 754 F.2d 395, 399-401 (D.C. Cir. 1985) (IRS case closely resembling case now before us); *In Re Sealed Case,* 676 F.2d 793, 815 (D.C. Cir. 1982).

Eighth: *Pritchard-Keang Nam Corp. v. Jaworski,* 751 F.2d 277, 280 (8th Cir. 1984); *In Re Berkley & Co.,* 629 F.2d 548, 553 (8th Cir. 1980); *In Re Murphy,* 560 F.2d 326, 331 and 338 n.23 (8th Cir. 1977); *Pfizer Inc. v. Lord,* 456 F.2d 545, 551 (8th Cir. 1972) (per curiam).

Third: *In Re Grand Jury Proceedings (FMC Corp.),* 604 F.2d 798, 800 (3d. Cir. 1979).

Fourth: *Union Camp Corp. v. Lewis,* 385 F.2d 143, 144 (4th Cir. 1967).

III

Other circuits have not always addressed the underlying policy question in allowing in camera review for purposes of the crime-fraud exception. As an en banc panel

---

[2] The Church of Scientology fails to distinguish these cases in any principled way. The Church does point out, correctly, that one of the D.C. cases only represents the views of one member of that court. *See In Re Sealed Case,* 676 F.2d 793, 815 (D.C. Cir. 1982)(J. Skelly Wright).

establishing the law of this circuit, however, we are obligated to address the policy question.

In particular, we are charged with evaluating the tradeoff between maintaining confidentiality and prosecuting crimes. In addressing this policy question, the Second Circuit considered an additional factor, grand jury secrecy. Grand jury secrecy would rest on the scale alongside maintaining confidentiality, weighing *against* in camera inspection; still the Second Circuit found that the balance tipped in favor of in camera inspection. *In Re John Doe Corp.,* 675 F.2d at 490.

The need to prosecute crimes strongly supports in camera inspection. The attorney-client privilege was not designed to protect communications in furtherance of fraud or crime. When a communication, otherwise within the privilege, itself furthers fraud or crime, independent evidence of that fact rarely will be available. In such cases the independent evidence requirement would simply insulate dishonest parties from prosecution. *See United States v. King,* 536 F.Supp 253, 262 (C.D. Cal. 1982) (declining to follow *Shewfelt's* independent evidence requirement).

Church of Scientology suggests that in camera inspection would undermine several important policies. First, inspection would allow the crime-fraud exception to eviscerate the attorney-client privilege. According to the Church, the possibility of inspection could "chill open attorney-client discussions." The fact that the inspections take place in camera, however, mitigates any chilling effect. A judge is not a prosecutor and will not expose discussions that are unrelated to the fraud or crime alleged.

Second, according to the Church, inspection would force courts to review "any and all attorney-client com-

munications upon the mere allegation by a party . . . that the crime-fraud exception applies." The fear of disclosure of even innocent communications would give prosecutors an unfair litigation advantage, and courts would incur the intolerable burden of reviewing file after file of communications.

In fact, the fear of disclosure of innocent communications would be reduced if the Ninth Circuit eliminated the independent evidence rule. In camera inspection would allow a district court more precisely to determine which communications further crime or fraud and which do not. *Compare In Re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986).

In any case, the predicate for the Church's conclusions is incorrect: in camera inspection need not force courts to review any and all documents alleged to fall within the crime-fraud exception. I would set out a rule that gives district courts discretion. Besides helping to prevent prosecutorial fishing expeditions, a rule affording discretion to district courts would allow those courts to regulate their burden of in camera review.

A district court, faced with an argument that the crime-fraud exception applies, would decide for itself whether a given case warrants in camera review. A district court would exercise its discretion to conduct in camera review according to the circumstances—including the presence or absence of circumstantial and other independent evidence. In a proper case, a district court might *reject* the crime-fraud exception without in camera review: without inspecting all documents alleged to evidence crime or fraud, or even without inspecting any documents—without hearing all conversations alleged to evidence crime or fraud, or even without hearing any conversations.

For additional protection of privileged documents—to avoid disclosure of innocent documents—I would also set out a rule that requires district courts to *allow* the crime-fraud exception only in relation to communications that the court individually has inspected in camera. This approach would be in line with the Sixth Circuit's position. In *In Re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986), the Sixth Circuit required the district court to review documents in camera before ordering them produced:

> Not only do we believe *in camera* review is mandated to determine the scope of the order, *in camera* review of the documents could have assisted the court in determining whether a *prima facie* violation had been made.

Church of Scientology hints that inspection would undermine another policy, that of supporting adversarial argument. In endorsing in camera review, the Second Circuit decided that limitations on adversarial argument are outweighed by the need to resolve an evidentiary question while preserving confidentiality. 675 F.2d at 490. In any case, the independent evidence rule itself does not support adversarial argument insofar as the subject of the argument—the communication alleged to be in furtherance of crime or fraud—is available to one party and not the other. At best a distorted form of adversarial argument can occur.

Finally, according to the Church, Federal Rule of Evidence 104(a) and *Bourjaily v. United States*, 107 S.Ct. 2775 (1987), indicate that a court making preliminary inquiries about a privilege must abide by preexisting evidence rules such as the indpendent evidence requirement. Rule 104(a), however, is not on point. The rule deals with questions about the existence of a privilege; not about an exception to a privilege:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Church of Scientology gains no support for the independent evidence requirement by analogy to Rule 104(a). In the Ninth Circuit the rules of evidence with respect to privileges do allow for in camera review: a court undertakes in camera review of documents to decide whether the attorney-client privilege even exists with respect to those documents. *In Re Grand Jury Witness,* 695 F.2d 359, 362 (9th Cir. 1982).

Church of Scientology garners no support from *Bourjaily*. In that case the Supreme Court held that a showing to admit a co-conspirator's statement under Rule 801(d)(2) need not rely on independent evidence, but may rely on the statement itself. If anything *Bourjaily* suggests that a court may indeed examine suspect communications when considering the crime-fraud exception. *Compare* 107 S.Ct. at 2780.

Accordingly, I would overrule *Shewfelt,* eliminate the independent evidence requirement, and allow in camera inspection of suspect communications. The way I would formulate the rule, however, would dictate that we affirm the district court in this case.

IV

The government argues that the district court abused its discretion by rejecting the crime-fraud exception without inspecting all the tape recorded communications known to the government. According to the rule I have described, a

district court would be within its discretion to *reject* the exception without inspecting all suspect communications or even any communications. In this case the government submitted only a partial transcript of material to the district court. When the government submitted that partial transcript, the government was aware of the entire contents of the tapes. *See* Government's Brief at 12 (discussing Xanthos Declaration submitted to district court on motion for reconsideration). The district court was entitled to rely on the government to highlight, to the best of its ability, those parts of the tapes that might fall within the crime-fraud exception.

On appeal the government asks us to order the district court to inspect those parts of the tapes that were not within the partial transcript. In the district court, however, the government did not indicate that a partial transcript was an inadequate basis for a ruling on the crime-fraud exception. *See* Denial of Motion for Reconsideration, Government's Supplemental Excerpt of Record at Tab 80. The government never explained why it had failed to include the other parts of the tapes in the partial transcript in the first place. *Id.* The district court was well within its discretion to consider only the partial transcript, and the district court did not abuse its discretion in rejecting the crime-fraud exception.

V

We should overrule *Shewfelt* and eliminate the independent evidence requirement. An appropriate rule would make in camera review discretionary for the district court to reject the crime-fraud exception, mandatory for the district court to allow the exception and order disclosure. In this case the district court did not abuse its discretion by rejecting the exception without a complete review.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-6065, 85-6105

UNITED STATES OF AMERICA,
PETITIONER/APPELLEE/CROSS-APPELLANT

v.

FRANK S. ZOLIN, RESPONDENT/APPELLEE

AND

CHURCH OF SCIENTOLOGY OF CALIFORNIA AND MARY SUE HUBBARD, INTERVENORS/APPELLANTS/CROSS-APPELLEES

Nov. 6, 1987

Prior Report: 809 F.2d 1411.

Before: BROWNING, Chief Judge, GOODWIN, WALLACE, KENNEDY, ANDERSON, HUG, TANG, SCHRODER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, NELSON, CANBY, NORRIS, REINHARDT, BEEZER, HALL, WIGGINS, BRUNETTI, KOZINSKI, NOONAN, THOMPSON O'SCANNLAIN, AND LEAVY, Circuit Judges.

ORDER

Upon the vote of a majority of the nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The previous three-judge panel assignment is withdrawn.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-6065; 85-6105
D.C. No. CV85-440-HLH

UNITED STATES OF AMERICA,
PETITIONER/APPELLEE/CROSS-APPELLANT

v.

FRANK S. ZOLIN, RESPONDENT/APPELLEE

AND

CHURCH OF SCIENTOLOGY OF CALIFORNIA AND MARY SUE HUBBARD, INTERVENORS/APPELLANTS/CROSS-APPELLEES

OPINION

Argued and Submitted
November 6, 1986—Pasadena, California

Filed February 9, 1987

Before: JAMES R. BROWNING, Chief Judge, ALFRED T. GOODWIN AND JEROME FARRIS, Circuit Judges.

Opinion by Judge FARRIS

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

OPINION

FARRIS, Circuit Judge:

In July 1984, the Criminal Investigation Division of the IRS (Los Angeles District) began investigating L. Ron Hubbard's tax returns for the tax years 1979 through 1983. In October, the IRS served an administrative summons on the Clerk of the Los Angeles County Superior Court and requested that he produce certain documents relating to Hubbard's potential tax liability. (The Superior Court had obtained the documents in connection with an unrelated proceeding brought by the Church against a former member of the Church.) The Clerk willingly produced a number of documents, but refused to produce thirteen documents which had been ordered sealed by the Superior Court.

In January 1985, the Government initiated this action in an effort to compel the Clerk to produce the thirteen sealed documents. Shortly thereafter, the district court granted the motions to intervene which were brought by the Church and Mary Sue Hubbard. The Intervenors contended that each of the thirteen documents was either privileged, irrelevant, or both. They also argued that the summons was unenforceable because it was not issued pursuant to a "good faith" tax investigation.

Hearings were held in March and April. On April 30, 1985, the district court ruled that eight of the documents—exhibits 4-D, 4-E, 4-F, 4-G, 5-C, 5-G, 5-I, and 6-B—were irrelevant, privileged, or both, and did not need to be produced. It ruled that five documents—exhibits 5-K, 5-L, 5-O, 5-P, and 6-O—should be produced, but prohibited the IRS from disclosing them to another governmental agency except in connection with a criminal tax prosecution or with the court's approval. The court

further ruled that the Intervenors had failed to prove that the summons was not issued in "good faith."

The Intervenors filed timely notice of appeal on July 1, 1985. The Government filed timely notice of cross-appeal on July 15, 1985. The order appealed from is a final order which disposes of all claims of all parties. We have jurisdiction under 28 U.S.C. § 1291.

II. DISCUSSION

A. *Mootness*

On January 24, 1986, during the pendency of this appeal, L. Ron Hubbard died. The Intervenors argue that because Hubbard's death has foreclosed the possibility of any further investigation of Hubbard's potential criminal tax liability, this proceeding has become moot. We reject the argument for the reason stated in *United States v. Author Services*, 804 F.2d 1520, 1522 n.1 (9th Cir. 1986).

B. *Relevance of Exhibits 5-O, 5-P, and 6-O*

The IRS' power to examine records in connection with tax investigations is broadly construed. *See Liberty Financial Services v. United States*, 778 F.2d 1390, 1392 (9th Cir. 1985); *De Masters v. Arend*, 313 F.2d 79, 87 (9th Cir. 1963). The relevance of such evidence depends on whether it might throw light on the correctness of a taxpayer's returns. *United States v. Goldman*, 637 F.2d 664, 667 (9th Cir. 1980). The Government must demonstrate a "realistic expectation" of relevance, rather than an "idle hope" of relevance. *Id.* (quoting *United States v. Harrington*, 388 F.2d 520, 524 (2d Cir. 1969).

The Government bases its claims that the three exhibits are relevant on the declaration of Agent Petersell, in which Petersell stated:

I have read the Petition to Enforce Internal Revenue Service Summons. Each of the items listed . . . is relevant to the investigation of L. Ron Hubbard in one or more of the following respects:

A. Determining the extent to which income from the Church of Scientology inured to the benefit of L. Ron Hubbard.

B. Determining whether L. Ron Hubbard conspired with others to impair and impede the Internal Revenue Service in the admiistration of the tax laws.

C. Determining whether any violations of the Internal Revenue laws were done willfully with intent to evade tax.

The Government's other evidence of relevancy consists of three terse descriptions of the documents' contents in the petition for enforcement of the summons:

00000(5-0)	LRH note regarding the Mayor of Clearwater, Florida, 22 March 1978.
PPPPP (5-P)	LRH Statement regarding money from Scientology, 16 Feb. 1978.
000000(6-0)	LRH handwritten note regarding the Fair Game policy.

The record does not indicate the Government's sources for this information.

While the Government might have made a better showing, the district court did not clearly err in concluding that Petersell's declaration, when coupled with the general descriptions of the documents in the petition to enforce the summons, was sufficient to establish the relevance of the documents. We do not ignore our statement in *Goldman:*

> The Government's burden, while not great, is also not non-existent. The Government appears to argue that the mere assertion of relevance by [an IRS agent] satisfied that burden. Even to the extent this might be true for records concerning the tax years being examined, relevance is not so clear when records for other years are sought.

Goldman, 637 F.2d at 667. Notwithstanding the fact that exhibits 5-O, 5-P, and 6-O all relate to years other than the tax years under investigation, we are satisfied that the district court, after balancing the indicia of relevancy against the impossibility of fully knowing the documents' contents before an actual review, did not clearly err in determining that the documents "might throw light" on the correctness of L. Ron Hubbard's return information.

C. Waiver of Privilege As to Exhibits 5-K and 5-L

The Intervenors do not contest on appeal the relevance of exhibits 5-K and 5-L. Instead, they contend that the district court erred in ruling that privileges which might otherwise have applied to the two documents were waived by a voluntary delivery of the documents to Gerald Armstrong. In addition, they argue that the district court erred when it concluded that exhibit 5-L would not be protected by the attorney-client privilege even in the absence of waiver because the affidavit of Hubbard's former attorney was too vague and conclusory to validly assert the privilege.

The attorney-client privilege is to be strictly construed *Weil v. Investment/Indicators, Research & Management, Inc.,* 647 F.2d 18, 24 (9th Cir. 1981). *See* 8 J. Wigmore, *Evidence* § 2291 at 554 (McNaughton rev. 1961). The logic behind the strict construction of the attorney-client privilege applies with equal force to the marital communications privilege: like the attorney-client privilege, the marital communications privilege is "an obstacle to the

investigation of the truth. . . . [that] ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." *Id.* The burden of demonstrating the existence of an evidentiary privilege rests on the party asserting the privilege. *See United States v. Gann,* 732 F.2d 714, 723 (9th Cir. 1984) (attorney-client privilege); *Weil,* 647 F.2d at 25 (evidentiary privileges generally). In order to establish the applicability of the attorney-client privilege to a given communciation, the party asserting the privilege must affirmatively demonstrate non-waiver. *See id.; United States v. Landof,* 591 F.2d 36, 38 (9th Cir. 1978).

The voluntary delivery of a privileged communication by a holder of the privilege to someone not a party to the privilege waives the privilege. *See Clady v. County of Los Angeles,* 770 F.2d 1421, 1433 (9th Cir. 1985) (the voluntary disclosure of a privileged attorney-client communication constitutes waiver); *United States v. McCown,* 711 F.2d 1441, 1452-53 (9th Cir. 1983) (the marital communications privilege is inapplicable to communications not intended to remain confidential); *Weil,* 647 F.2d at 24 (the voluntary disclosure of a privileged attorney-client communication constitutes waiver). Moreover, when the disclosure of a privileged communication reaches a certain point, the privilege may become extinguished even in the absence of a wholly voluntary delivery. *See In re Sealed Case,* 676 F.2d 793, 818 (D.C. Cir. 1982) ("Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the privilege."). Whether the circumstances of the delivery of exhibits 5-K and 5-L to Armstrong gave rise to a waiver of the otherwise applicable privileges is a mixed question of law and fact that we review *de novo. See United States v. McConney,* 728 F.2d 1195, 1199-1204 (9th Cir. 1984) (en banc).

The district court held that all privileges potentially applicable to exhibits 5-K and 5-L were waived by a voluntary delivery of the documents to Gerald Armstrong. We agree. The Intervenors argue that the delivery could not have been voluntary since the correspondence between Armstrong and Hubbard contains no express indication that Armstrong intended to, or had Hubbard's permission to, collect communications between Hubbard and his wife or between Hubbard and his attorneys.

Although Hubbard did not explicitly grant Armstrong access to attorney-client or marital communications, Hubbard did, in a memorandum to Armstrong, grant Armstrong general permission to collect documents relevant to the proposed biography of Hubbard. The Intervenors' only argument in support of non-waiver is that Hubbard did not specifically grant Armstrong access to attorney-client and marital communications. More is required.

Since the attorney-client privilege which might otherwise have attached to exhibit 5-L was waived, we need not consider whether the attorney-client privilege was validly asserted by Hubbard's former attorney.

D. *Limited Evidentiary Hearing*

We review for abuse of discretion. *See United States v. Stuckey,* 646 F.2d 1369, 1373 (9th Cir. 1981). *See generally Rae v. Union Bank,* 725 F.2d 478, 481 (9th Cir. 1984) (a district court's decisions relating to discovery matters are reviewed for abuse of discretion).

The purpose of the limited evidentiary hearing was to determine whether the summons enforcement proceeding was legitimate and in "good faith," rather than merely camouflage for an ulterior non-tax motive. The "good faith" standard seeks to prevent the IRS from becoming an information-gathering agency for other governmental

agencies. *See United States v. LaSalle National Bank*, 437 U.S. 298, 317 (1978); *Stuckey*, 646 F.2d at 1373. The task is to identify " 'those rare cases where bald allegations of harassment or improper purpose can be substantiated.' " *Author Services*, 804 F.2d at 1523 (quoting *United States v. Church of Scientology of California*, 520 F.2d 818, 824 (9th Cir. 1975)). The focal issue is whether an IRS investigation is motivated by legitimate tax purposes. *See United States v. Powell*, 379 U.S. 48, 57-58 (1964). The district court may properly limit evidentiary hearings on the "good faith" issue to prevent a frustration of legitimate Government objectives. *Church of Scientology*, 520 F.2d at 823-25.

The Intervenors argue that the district court improperly limited its inquiry to the issue of whether the summons itself was issued in "good faith," and ignored and larger issue of whether the overall investigation was in "good faith." We reject the argument. At the hearing, C. Phillip Xanthos, the Branch Chief of the IRS Criminal Investigation Division (Los Angeles District), specifically testified as to the legitimate tax-determination objectives of the investigation. This and other testimony was sufficient to support the district court's finding that the summons was issued in "good faith." *See LaSalle National Bank*, 437 U.S. at 317. *See also Stuckey*, 646 F.2d at 1376; *United States v. Zack*, 521 F.2d 1366, 1368-69 (9th Cir. 1975).

E. *Restrictions on IRS Disclosure of the Summoned Documents*

The district court ordered that "the documents produced in response to the summons shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained." We review the district court's order for abuse

of discretion. *See United States v. Columbia Broadcasting System*, 666 F.2d 364, 368 (9th Cir. 1982).

The Government argues that the district court's order conflicts with the disclosure provisions of 26 U.S.C. § 6103. Those provisions, the Government suggests, are the exclusive limitations upon IRS disclosure of return information. In addition, the Government argues that the order represents an improper attempt to enjoin the IRS from obeying a duly enacted federal law.

We recently rejected this argument in *Author Services*, and held that a district court's order restricting the IRS' ability to disclose summoned materials to other governmental agencies, "[r]ather than being an abuse of discretion, . . . [could] be a wise exercise of control." *Author Services*, 804 F.2d at 1526. The district court's order in this case created a mechanism whereby the district court could monitor the IRS' use of the summoned documents. This is an appropriate exercise of the district court's discretion: "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." *Powell*, 379 U.S. at 58. *See S.E.C. v. ESM Government Securities, Inc.*, 645 F.2d 310, 316-17 (5th Cir. 1981). A district court may, when appropriate, condition enforcement of a summons on the IRS' agreeing to abide by disclosure restrictions. *Author Services*, 804 F.2d at 1525 (citing *United States v. Texas Heart Institute*, 755 F.2d 469, 481 (5th Cir. 1985)).

The Intervenors also argue that the district court's order violates 26 U.S.C. § 7421(a) (the "Anti-Injunction Act"), because it has the effect of enjoining the IRS from disclosing the summoned tax information. We reject the argument for the reasons stated in *Author Services*, 804 F.2d at 1526.

F. *Exhibit 5-C ("the Tapes")*

The district court's rulings on the scope of the attorney-client privilege involve mixed questions of law and fact, and are reviewable *de novo*. *See McConney*, 728 F.2d at 1202. Where the relevant scope of the attorney-client privilege is clear and the decision that the district court must make is essentially factual, however, the district court's rulings as to the privilege are reviewed for clear error. *Id.* at 1200.

The Government contends that the district court erred in finding that the "common interest" rule covered the tapes. The "common interest" rule protects communications made when a nonparty sharing the client's interests is present at a confidential communication between attorney and client. The paradigm case is where two or more persons subject to possible indictment arising from the same transaction make confidential statements that are exchanged among their attorneys. *See Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965).

The Government is incorrect, however, in arguing that the "common interest" rule is limited to such a case. Even where the non-party who is privy to the attorney-client communications has never been sued on the matter of common interest and faces no immediate liability, it can still be found to have a common interest with the party seeking to protect the communications. *See Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26, 44-45 (D. Md. 1974); *Stanley Works v. Haeger Potteries, Inc.*, 35 F.R.D. 551, 554-55 (N.D. Ill. 1964).

The district court found that the parties present at the meetings recorded on the tapes "had a common interest" in sorting out the respective affairs of the Church and Mr. Hubbard. We agree. All of the non-lawyers present at the meeting were employees of the Church.

The Government also challenges the district court's finding that the Church did not waive its attorney-client privilege when it inadvertently delivered the tapes to Armstrong. (Hubbard's personal secretary gave Armstrong the tapes under the mistaken impression that they were blank.) In *Transamerica Computer Co., Inc. v. International Business Machines, Corp.*, 573 F.2d 646 (9th Cir. 1978), we held that whereas a waiver of the attorney-client privilege occurs when a holder of the privilege voluntarily discloses the privileged matter, no waiver occurs if the holder has no opportunity to claim the privilege or if the holder was erroneously compelled to disclose the privileged matter. *Id.* at 651. The secretary's delivery of the tapes to Armstrong was sufficiently involuntary and inadvertent as to be inconsistent with a theory of waiver.

The Government challenges the district court's ruling that the "crime-fraud" exception to the attorney-client privilege did not apply to the tapes. The attorney-client privilege does not protect communications that further a crime or fraud. *See United States v. Hodge and Zweig*, 548 F.2d 1347, 1354 (9th Cir. 1977). The Government had the burden of making a prima facie showing that the attorney-client communications recorded on the tapes were in furtherance of an intended or present illegality. *Id.* We agree with the district court's conclusion that the Government failed to satisfy this burden.

The Intervenors argue that the Government's evidence of crime or fraud must come from sources independent of the attorney-client communications recorded on the tapes. In support of this argument, they cite *United States v. Shewfelt*, 455 F.2d 836 (9th Cir. 1972). In *Shewfelt*, we said that "before the privileged status of [attorney-client] communications can be lifted, the government must first establish a prima facie case of fraud *independently* of said communications." *Id.* at 840 (emphasis added). Notwith-

standing *Shewfelt*, the Government argues that in assessing the applicability of the "crime-fraud" exception to the tapes the district court should have considered evidence of the contents of the tapes which the Government presented to the court.

Shewfelt's independent evidence requirement has been strongly criticized. In *In re Berkley and Co., Inc.*, 629 F.2d 548, 553 n.9 (8th Cir. 1980), the Eighth Circuit observed that the two cases cited in *Shewfelt*, assertedly in support of the independent evidence requirement, in fact simply state that a party seeking disclosure under the "crime-fraud" exception must make a prima facie showing of crime or fraud in order to shift the burden of showing the inapplicability of the exception to the party resisting disclosure.

In the fourteen years that have passed since *Shewfelt* was decided, only one court has cited it as authority for the independent evidence requirement. *See Kockums Industries Limited v. Salem Equipment, Inc.*, 561 F. Supp. 168, 171 (D. Ore. 1983). By contrast, a number of courts have rejected the *Shewfelt* position. *See, e.g., In re Sealed Case*, 676 F.2d at 815; *In re Special September 1978 Grand Jury*, 640 F.2d 49, 59 (7th Cir. 1980); *In re Berkley*, 629 F.2d at 553 n.9; *Coleman v. American Broadcasting Companies, Inc.*, 106 F.R.D. 201, 207 n.9 (D.D.C. 1985); *United States v. King*, 536 F. Supp. 253, 262 (C.D. Cal. 1982).

In *Hodge and Zweig*, we discussed the "crime-fraud" exception at length without ever referring to *Shewfelt*. 548 F.2d at 1354-55. Instead, we cited repeatedly to *United States v. Friedman*, 445 F.2d 1076 (9th Cir. 1971), a decision which implicitly recognized that a district court may examine the disputed communications themselves in order to determine the applicability of the "crime-fraud" exception. *Id.* at 1354.

In this case, the communications recorded on the tapes appear to be the Government's best evidence establishing the applicability of the "crime-fraud" exception. This is not surprising, since the illegal advice allegedly given by Church attorneys to Church officials is an integral part of the intended illegality that the Government seeks to establish. In this connection, the court's observation in *King* is pertinent: "[S]ince the illegal advice is usually given in the attorney-client setting, applying *Shewfelt* to such cases would, in most instances, simply serve to insulate dishonest attorneys from prosecution for obstruction of justice." *King*, 536 F. Supp. at 262.

In *King*, the court speculated that "the independence test set forth in *Shewfelt* does not appear to be the law in the Ninth Circuit." *Id.* We cannot agree. Whatever the merits of the criticisms that have been leveled against *Shewfelt*'s independent evidence requirement, we are bound to adhere to our holding in *Shewfelt* unless and until it is reversed by an *en banc* panel of this court. *See United States v. Spilotro*, 800 F.2d 959, 967 (9th Cir. 1986); *Atonio v. Wards Cove Packing Co., Inc.*, 768 F.2d 1120, 1132 n.6 (9th Cir. 1985).

The Government's independent evidence of intended illegality consists primarily of: 1) Agent Petersell's Supplemental Declaration of March 8, 1985, in which Petersell stated that his discussions with Gerald Armstrong had given him reason to believe that the communications recorded on the tapes focused generally on the intentional violation of the tax laws; and 2) Petersell's Supplemental Declaration of March 15, 1985, in which Petersell stated that his discussions with three other former Church employees had given him reason to believe that the communications recorded on the tapes specifically focused on i) a proposed scheme whereby the Church's cash transfers to Hubbard would be disguised as payments for services

rendered (allegedly to insulate Hubbard from tax liability and to protect the Church's tax-exempt status), and ii) a proposed scheme whereby Hubbard would be able to control royalty income derived from the "Trademark Trust" (a trust that was created to manage Hubbard's various Scientology-related and other trademarks) without that control being traceable to him.

We agree with the district court that this evidence, while not altogether insubstantial, is not sufficient to make out the requisite prima facie showing of intended illegality.

AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 85-0440-HLH

UNITED STATES OF AMERICA

v.

FRANK ZOLIN

CIVIL MINUTES – GENERAL

Date June 10, 1985

PRESENT: Hon: HARRY L. HUPP, Judge

ATTORNEYS PRESENT FOR PLAINTIFFS:
Robert S. Horwitz, AUSA C. Magnusen

ATTORNEYS PRESENT FOR DEFENDANTS:
Gordon, Trask, Donald Randolph,
Michael Lee Hertzberg (for intervenors)

PROCEEDINGS: Plaintiff's Motion for Reconsideration

The motion for reconsideration of the court's order of April 30, 1985, is denied.

Plaintff complains that the court should have listened to the tapes in :oto. While this was at one time discussed with counsel, thereafter Mr. Petersell's declaration was sub-

mitted, and no one suggested that this was an inadequate basis on which to determine the attorney-client privilege question. Mr. Xanthos' declaration stands on a similiar footing; no reason is suggested as to why it could not have been submitted as a part of the materials considered in the April hearings.

Plaintiff also complains that the court should not have restricted the IRS from disclosing for other governmental purposes the contents of the documents ordered produced. Since the entire basis of the summons proceeding was to obtain material for a tax investigation, the court thinks it reasonable to restrict the use of the material for that purpose, unless a criminal prosecution is instituted. If exigencies of other litigation make it necessary, the IRS is free to make its case for an exception to this court.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 85-0440-HLH

UNITED STATES OF AMERICA, PETITIONER

vs.

FRANK S. ZOLIN, CLERK OF THE SUPERIOR COURT, RESPONDENT

CHURCH OF SCIENTOLOGY OF CALIFORNIA, INTERVENOR

[Filed Apr. 30, 1985]

ORDER

The Court makes the following Orders and Findings:

1. Reconsideration is denied as to Exhibits 5G and 5I; the Order of March 12, 1985 will stand.

2. Intervenor Church has failed to raise any doubt of the good faith of the Internal Revenue Service in pursuing this summons enforcement proceeding. Specifically, it is found that a bona fide criminal tax investigation of L. Ron Hubbard is being conducted by the IRS for the years 1979-83, that the matter has not been referred to the Department of Justice for prosecution, that the summons was validly issued pursuant to that investigation, that the agent issuing the summons was in good faith in doing so, and did not do so for an improper purpose, or to harass the taxpayer, or for a collateral purpose. No further discovery on this issue is warranted.

3. With the exception of Exhibits 6B and 5C (the "MCCS tapes"), the Court finds that all potentially applicable privileges (attorney-client, marital) have been waived by voluntary delivery of the material to Gerald Armstrong. In addition, no privilege has been validly asserted by the holder of a potential privilege as to certain items (Exhibits 5L and 5P).

4. Sufficient relevancy being shown, the IRS is entitled to inspect and copy Exhibits 5K, 5L, 5O, 5P and 60, and the summons is to be enforced as to those items.

5. No relevancy or waiver has been shown for Exhibit 6B, and it need not be produced.

6. As to Exhibit 5C (the "MCCS tapes"), the Court finds:

(a) The tapes consist of confidential communications between attorneys and clients or clients' authorized agents.

(b) The confidential communications were between clients and their attorneys who had a common interest; the privilege was, therefore, not destroyed by publication of the communication to an outsider.

(c) There was no waiver of the privilege by delivery to an outsider, the Court finding that the tapes were delivered to Gerald Armstrong by mistake, and, in addition, that Petitioner has not carried the burden of showing waiver.

(d) The "fraud-crime" exception to the attorney-client privilege does not apply. The quoted excerpts tend to show or admit past fraud but there is no clear indication that future fraud or crime is being planned.

(e) The Order sealing the Petersell affidavit (filed March 15, 1985) quoting excerpts from the tapes will remain sealed.

(f) This Court's copy of the tapes will remain sealed in possession of the Court's Clerk until after any appellate

review of this Order, after which it is to be returned to the Superior Court. The Clerk of the Superior Court need not produce its copy of the tapes pursuant to the summons.

7. The documents delivered hereunder shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained.

Petitioner is to prepare an Order in accord with this Order and the Order of March 12, 1985. This Order is stayed for sixty (60) days, and thereafter if an appeal or application for a writ is filed and until decision on appeal or writ application is rendered.

IT IS SO ORDERED.

DATED: April 30, 1985.

/s/ HARRY L. HUPP

HARRY L. HUPP
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 85-0440-HLH

UNITED STATES OF AMERICA, PETITIONER

vs.

RAUL ACOSTA, ACTING COUNTY CLERK,
LOS ANGELES COUNTY, RESPONDENT

CHURCH OF SCIENTOLOGY OF CALIFORNIA, INTERVENOR

Filed Mar. 12, 1985

INTERIM ORDER RE PETITION TO ENFORCE SUMMONS

1. Intervenor's request to stay these proceedings is denied.

2. The petition to enforce summons is denied as to the following documents on the ground that sufficient relevancy to the IRS inquiry has not been shown:

4-D, 4-E, 4-F, 4-G, 5-G and 5-I

(5-I is not mentioned by petitioner; thus, no relevancy shown; the remaining documents go back to the '40s, '50s and '60s, and are hardly relevant to tax years 1979-83.)

3. Intervenor's discovery request is denied.

4. Intervenor's request for an evidentiary hearing on the "good faith" issue is granted as required by *U.S.A. v. Church of Scientology* (9th Cir. 1975) 520 F.2d 818. The

hearing is limited to one hour, during which the Church may examine Mr. Petersell.

5. The balance of the hearing is continued to April 1, 1985, at 10:00 a.m., for the purpose of substituting Mr. Zolin, in his capacity as Superior Court Clerk, in place of Mr. Acosta as Acting Clerk, and to specifically invite the Superior Court, the California Court of Appeal, Second District, Division 3, and the California Supreme Court to intervene on or before March 25, 1985 to express their position, if they desire and have a position on this summons.

(The County Counsel is right in saying that the Clerk is a ministerial officer of the Superior Court and that the documents are in the possession of the Superior Court, not its ministerial employees. This Court has the duty to enforce federal law and sees nothing on the surface of this case that would indicate that doing so conflicts with the purposes or interests of the Superior Court; nevertheless, that court, being in possession of the documents in question, must be allowed to express any concerns it has before the Court proceeds. In addition, the state Court of Appeal has restrained, pending appeal, release of certain documents, and should be asked to present any concerns to this Court arising out of this proceeding. This Court assumes that the real parties in interest here are Armstrong and Mrs. Hubbard (who have not intervened) and Intervenor Church, that one or the other will eventually be entitled to the documents on the state court judgment becoming final, and that this Court should examine the pending petition from the perspective of the rights of those parties, not the state court. However, this conclusion will not be drawn finally until the state courts in interim con-

trol of the documents have a chance to express their positions, if any.)

IT IS SO ORDERED.

DATED: March 12, 1985.

/s/ HARRY L. HUPP

HARRY L. HUPP
United States District Judge

U.S. GOVERNMENT PRINTING OFFICE 1986 – 202 037 60520